IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 04-3966

MELISSA ABDOUCH
Appellant,

v.

VICKI BURGER, RAINA BOYUM, KATHRIN BETZING and ALISON DOWNS, in their individual capacities and in their capacities as employees of the South Dakota Department of Social Services,
Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

THE HONORABLE KAREN SCHREIER
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

BRIEF OF APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Melissa Abdouch's infant son was removed from her custody after a routine x-ray revealed he had numerous broken bones. The investigation into the abuse quickly focused on Melissa's husband, Michael, as the perpetrator. Despite the acknowledged fact there was no evidence Melissa knew or should have known about the abuse and failed to protect him, defendants prosecuted Melissa for child neglect and vigorously sought for seven months to terminate her parental rights. Underlying the lack of evidence to support the prosecution was palpable personal animosity. When the neglect prosecution was terminated in her favor, Melissa filed this civil rights suit and brought two state law claims as well. Defendants moved for summary judgment, which the trial court granted based on qualified and absolute immunity.

At the heart of this appeal is a parent's constitutional liberty interest in familial integrity. Also at stake is the right to be free from child abuse prosecutions that are not objectively reasonable. The presentation of oral argument would enhance each party's ability to advance its arguments and would assist the Court in considering the issues. Accordingly, Melissa respectfully requests that the court allow oral argument (20 minutes per side) to further address the issues presented by this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case was commenced by Melissa Abdouch under 42 USC § 1983. Subject matter jurisdiction existed under 28 USC §§ 1331, 1343 and 1367. The trial court granted summary judgment based on qualified and absolute immunity in an Order dated October 28, 2004. Melissa filed a timely Notice of Appeal on November 23, 2004. This Court has appellate jurisdiction under 28 USC § 1291.

STATEMENT OF THE ISSUES

I. Whether the trial court erred in granting summary judgment to defendants based on qualified and absolute immunity on a 42 USC § 1983 claim when they persisted in prosecuting Melissa Abdouch for child neglect and seeking for seven months to terminate of her parental rights in the acknowledged absence of any evidence showing she was guilty of neglect and in the face of evidence the prosecution was based on personal animosity.

Swipies v. Kofka, 348 F.3d 701 (8th Cir. 2003)
Ripson v. Alles, 21 F.3d 805 (8th Cir. 1994)
Manzano v. South Dakota Dep't of Social Services, 60 F.3d 505 (8th Cir. 1995)

STATEMENT OF THE CASE

After a state court child neglect prosecution was concluded in her favor, Melissa Abdouch brought a civil rights claim pursuant to 42 USC § 1983, alleging defendants deprived her of her liberty interest in the care, custody and management of her children. She also brought two state law claims. Defendants moved for summary judgment, which the trial court granted based on qualified and absolute immunity.

STATEMENT OF THE FACTS

In early August of 2000, Melissa Abdouch lived in Sioux Falls, South Dakota with her husband, Michael, and their three children, Alexandra, Andrew and Avery. Add. 1. At the time, Avery was 10 weeks old, and Melissa regularly brought him to the Abdouch family practice physician, Dr. Glenn Ridder, for well baby checkups.[1] App. 50, 35. Avery was examined during these visits not only by Dr. Ridder but also by his nurse. App. 61-62. Because he was born with a heart murmur, Avery also saw a cardiologist, Dr. Sami Awadallah. Add. 2. Prior to August of 2000, none of the physicians or nurses who examined Avery noticed anything unusual about his appearance or physical condition. App. 62.

On August 8, 2000, Dr. Awadallah ordered a routine chest x-ray. Add. 2. It revealed Avery had numerous rib fractures. Id. On August 9, Dr. Ridder informed

[1] Avery was born May 25, 2000. App. 1.

Melissa about the fractures and asked her to bring Avery to the emergency room, which she did. Id. Dr. Richard Kaplan examined Avery and ordered additional x-rays. Id. These x-rays revealed other broken bones, including a fractured collarbone and fractures in Avery's arms and legs. Id. Dr. Kaplan notified the authorities because he suspected Avery had been abused. Id.

Detective Blaine Larson of the Sioux Falls Police Department and Alison Downs and Raina Boyum of the South Dakota Department of Social Services were called to investigate.[2] Add. 2-3. Melissa and Michael were questioned about Avery's injuries. Add. 2. Although both denied abusing Avery, the investigation soon focused on Michael. Id. Melissa told the detectives she did not see Michael abuse Avery and that she was unaware Avery had been abused. Id. After the police interviews were completed, Melissa was permitted to take her three children home on the condition that Michael not stay at the family's home. Add. 3. Melissa agreed to return to the hospital the next day with Alexandra and Andrew so they could be evaluated for signs of abuse. Id.

The medical examinations conducted on August 10 revealed no evidence Alexandra and Andrew had been abused. Id. Downs and Boyum nevertheless removed all three children from Melissa's custody and placed them at the

[2] Downs was the intake social worker, and her duties included receiving referrals, conducting investigations and determining what action was warranted. Add. 3.

Children's Inn. Id. Downs told Melissa a temporary custody hearing would take place the next day and that she would tell the court she felt comfortable sending the children home with Melissa. Id.

Downs and Boyum completed Child Placement Agreement and Case Plan Addendums for each child on August 10 and listed sexual abuse as one of the "Known present problems" involving the Abdouch children. Add 3-4. In reality, there was no evidence to indicate any of the Abdouch children had been sexually abused. App. 103, 111, 123.

A temporary custody hearing took place on August 11. Add. 4. Downs failed to inform the court she felt comfortable sending the children home with Melissa. Id. After the hearing, Downs and Boyum placed Avery in foster care.[3] Id. Melissa previously informed them both sets of grandparents were willing to care for Avery so he would not have to be placed with a stranger and that the grandparents were willing to abide by any restrictions placed on them. Id. Melissa's parents even agreed to come from their home in Minnesota and live in Melissa's house to care for Avery. App. 144. Because of Downs' failure to recommend releasing the children to Melissa's custody and Avery's placement in

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Boyum was Downs' supervisor. Id. Downs could not make important decisions without consulting with Boyum. Id.

[3] Downs and Boyum also told Melissa that Alexandra and Andrew would not be allowed to return home with her. Add. 4. They were placed with Michael's parents, but Melissa could only have supervised visitation with them. Id.

foster care, Melissa felt Downs and Boyum were not being honest and intended to take Avery away permanently. Add. 4.

Based on their investigation, Downs and Boyum concluded Michael abused Avery and Melissa neglected him. App. 11. As a result, Minnehaha County Deputy State's Attorney Pam Tiede filed an abuse and neglect Petition on August 16. App. 14-15. It is undisputed that a prosecution based on neglect requires the Department to demonstrate Melissa either knew about the abuse or should have known about it and failed to protect Avery. App. 61, 111.

After the abuse and neglect Petition was filed, Cynthia Howard was appointed as Avery's attorney. Add. 8. Lynn Heinemann was named the Court Appointed Special Advocate. App. 115. Her duties included investigating the case and preparing reports for the court.[4] Id.

Downs and Boyum completed a Risk Assessment Matrix on August 18. Add. 5. They described Avery as having sustained injuries to his head, face and genitals and stated Avery required immediate medical treatment. Id. While Avery had been abused, he had no injuries to these parts of his body, and he required no medical treatment. App. 81-82. They also labeled Melissa as being emotionally handicapped, having an uncontrolled mental illness, having continual insufficient income, not displaying appropriate parenting skills and being unwilling to provide

even a minimal level of child care. Add. 5. In reality, there was no evidence to support these claims. App. 54-55, 123, 133.

By the end of August, Detective Larsen had thoroughly investigated the abuse case with Downs and Boyum, and no one found any evidence Melissa abused Avery or knew or should have known about the abuse. App. 87-88, 92-93, 96, 104, 79-80, 55. There was also no evidence that Alexandra or Andrew had been abused or that Michael ever abused Melissa. App. 83, 129, 137. Detective Larsen ruled out Melissa as a suspect. App. 87-88, 91. He believed Michael was responsible for the abuse.[5] App. 83. Michael never implicated Melissa in any abuse, and when Detective Larson informed Melissa that Michael admitted he "lost his cool" with Avery, he said Melissa appeared surprised. App. 83-84, 88.

Melissa had no reason to believe Michael abused Avery, but she informed Detective Larsen, Downs and Boyum she would do anything necessary to protect her children. App. 89-90, 56. At the same time, Melissa learned of a condition called osteogenesis imperfecta, also known as brittle bone disease. App. 113. Before she resigned herself to the fact that Michael abused Avery, she wanted to rule out this condition. Id. Arrangements were made to have Avery tested. Id.

After Downs and Boyum removed Avery from Melissa's custody, Kathrin

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[4] Heinemann was a registered nurse who had frequent contact with the social workers and with Melissa. App. 115.

Betzing and Vicki Burger became involved in the case.[6] Add. 6. It is undisputed that in September of 2000 Betzing and Burger decided to seek termination of Michael and Melissa's parental rights. Add. 6. Burger called Tiede on September 21 and said they made this decision because they "don't know who caused [Avery's] injuries. App. 146. Betzing and Burger also terminated Melissa's visitation with Avery on this date based on their decision to seek termination. App. 146, 23-24, 135, 118.

After Heinemann and Howard learned Melissa's visits were terminated, they reviewed the videotapes of Melissa's visits with Avery and contacted Betzing to request Melissa's visits be reinstated. App. 134-135, 118, 26-27. In her letter, Howard informed Betzing there was "a very real possibility" Melissa will regain custody of Avery.[7] App. 26-27.

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[5] Michael did not admit to abusing Avery, but he said there were a couple of occasions where he did "lose his cool" with Avery. App. 84, 93.

[6] Betzing was the case manager, and her duties included developing and following through with a case service plan. Add. 6. Burger supervised Betzing and assisted in this process. Id. Like Downs, Betzing could not make important decisions without Burger's approval. App. 110.

[7] Howard was aware Betzing and Burger made numerous requests of Melissa during the pendency of the abuse and neglect prosecution, and Melissa complied with all reasonable requests, including being assessed at the Family Violence Project; attending parenting classes; completing a psychological evaluation; continuing in therapy; attending scheduled visitations; and completing an alcohol and drug assessment. App. 52. Melissa satisfied these requests well before she was required to do so, and she received outstanding results, confirming she would do anything to protect her children, that she was completely open and honest and that there was no reason to suspect she would be a threat to her children. See e.g.,

At the end of September, Melissa learned that Avery did not have osteogenesis imperfecta, and as a result she filed for divorce on October 5, 2000.[8] Add. 7. Michael permanently moved out of the Abdouch home in October. App. 117.

The Adjudicatory Hearing was held on October 18. Add. 8. Downs, Betzing and Detective Larsen all testified they were aware of no evidence to indicate Melissa abused Avery or that she knew or should have known about the abuse. App. 87-88, 92-93, 96, 104, 79-80, 55. Several doctors also testified that although Avery's injuries were severe, they would not be visible to a layperson. Add. 8. Based upon the medical evidence presented, the court declared Avery an abused or neglected child under South Dakota law.[9] Id., App. 28.

App. 33-36.

Betzing and Burger also made several requests Melissa believed were based on their personal animosity toward her and that were completely without reason or merit. First, they demanded Melissa no longer see Dr. Ridder. App. 55. They did not consult Tiede about this demand, and no one questioned Dr. Ridder's abilities as a family practice physician. App. 126, 138, 123. They also demanded that Melissa submit to another psychological evaluation in addition to the one conducted by Dr. John Sivesind. App. 58. The Department regularly calls upon Dr. Sivesind for evaluations because he is thorough, accurate and trustworthy. App. 59-60. They did not consult Tiede about this demand, and she had never seen a situation where Dr. Sivesind has done an evaluation and the Department wanted another evaluation done. App. 126-127. Howard believed this demand "was excessive" and Heinemann believed it was unnecessary. App. 138, 123.

[8] Melissa was also told that she would never have her children back if she did not divorce Michael. Add. 7.

[9] The court's task at the adjudicatory hearing was only to determine whether Avery had been either abused or neglected. See SDCL 26-7A-1 (defining "Adjudicatory

Although Betzing and Burger had no evidence Melissa was involved in Avery's abuse, they were still intent on seeking termination of Melissa's parental rights. App. 30. Melissa believed this decision was based on their personal animosity toward her, and there was testimony to support this. Heinemann testified there was a personality conflict between Betzing and Burger and Melissa. App. 120. According to Heinemann, Betzing and Burger had a difficult time listening to another person's point of view. App. 116. She said Melissa was an educated person who asked "why" and this was viewed as disrespectful of their authority. App. 120. It was Howard, however, who best described how Melissa was treated. Howard testified that Betzing and Burger were "petty and personal" as opposed to professional. App. 137. She believed the only reason Melissa was targeted was because there was no clear evidence against Michael. App. 138. Howard also testified she was concerned about the position that Betzing and Burger were taking in this case. App. 136. Defendants' expert witness, Judy Hines, agreed it would not be appropriate for a social worker to act in a petty and personal manner because it can have an effect on their judgment. App. 75. Perhaps most important, Hines did not see anything in the record that warranted

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hearing" as "a hearing to determine whether the allegations of a petition alleging that a child is abused or neglected are supported by clear and convincing evidence."). At this stage of the proceedings, the court does not determine who is responsible for the abuse or neglect. Id. Circuit Judge Gene Paul Kean told the parties as much at the hearing. App. 97, 105-109.

the Department seeking to terminate Melissa's parental rights. App. 73.

On November 7, Michael agreed to plead guilty to simple assault for abusing Avery. Add. 9. As of December 5, however, Betzing told Melissa's counselor they were still intent on terminating Melissa's parental rights. App. 30. About the same time, Melissa was allowed to resume visits with Avery. Add. 8. Hines testified it was not appropriate to consider terminating Melissa's parental rights after December of 2000, when Melissa's visitation was reinstated. App. 77. In fact, she has never known of a situation where a child has been returned to a parent when termination of parental rights was being considered. App. 72.

On January 20, 2001, Melissa was granted a divorce from Michael. Add. 9. In mid-March, Avery was transitioned home with Melissa. Add. 8-9. As of early April, however, Betzing and Burger still intended to seek termination of Melissa's parental rights. Add. 9, App. 147.

On April 3, Tiede notified Betzing she did not think they had sufficient evidence to terminate Melissa's parental rights. Add. 9. Tiede also said termination was inappropriate because Melissa was divorced from Michael, was intent on moving to Minnesota, had the other two children and had done the things asked of her. Id. Because they were intent on terminating Melissa's rights, Betzing and Burger had Tiede removed from the case and replaced by Assistant

Attorney General Anthony Sanchez.[10] Add. 9-10, App. 45, 130. Tiede had never before been removed from prosecuting an abuse and neglect case. App. 131. It is undisputed that the defendants replaced Tiede because she gave them advice with which they disagreed. Add. 9, App. 130, 138,122.

The dispositional hearing was scheduled for June 13, 2001, but as late as June 4, Betzing and Burger were still intent on terminating Melissa's parental rights. App. 44, 142, 131. In addition to Tiede, Howard and Heinemann also believed that Melissa's rights should not be terminated. App. 135, 121.

Some time after Sanchez reviewed the file and consulted with Betzing and Burger, they decided they would not seek termination of Melissa's parental rights.[11] Add. 10. The first time they notified Melissa of this, however, was the morning of the dispositional hearing, June 13. Id. Although they were not going to seek termination of her parental rights, they proceeded with the dispositional hearing because they were requesting a six-month continuance to continue to observe Melissa. Id.

Only two witnesses testified on behalf of the Department at the dispositional

[10] According to Tiede, "after I expressed what I felt the position was going to be in the dispositional hearing, they told me they still wanted to pursue termination of parental rights … so they told me that they had gotten hold of Mr. Sanchez and he would be handling the case." App. 130.

[11] Sanchez was also aware of the antagonism between Betzing and Burger and Melissa. App. 141. He testified, "the impression I got from them was that the situation was degrading rapidly and that they were frustrated." App. 142.

hearing. Betzing again acknowledged the basis for the Department's case against Melissa was her alleged failure to recognize the abuse and prevent it from occurring. App. 61. Betzing again testified she was aware of no evidence Melissa knew or should have known about the abuse. App. 61-62. She also admitted there was no evidence Melissa was not going to protect Avery from Michael or that she was going to reconcile with him. App. 63-64. Betzing conceded that because there was no evidence Melissa knew or should have known about the abuse, there was no way she could have failed to recognize the abuse and prevent it from occurring. App. 65. Home Based Services worker Beth Zimmerman also testified. She monitored Melissa's parenting ability and said that in all of her announced and unannounced visits to the Abdouch home, she observed nothing that caused her any concern. App. 67-69. More specifically, there was no evidence Melissa allowed Michael to visit with Avery or that Michael was even at Melissa's home. App. 68-69, 123, 140, 114. Zimmerman also testified she was aware of no evidence to indicate Melissa abused Avery or knew or should have known about the abuse. App. 69-70. Judge Kean denied the request for a continuance and dismissed the abuse and neglect prosecution. Add. 10, App. 46. Melissa then brought this suit.

SUMMARY OF THE ARGUMENT

Defendants were not entitled to qualified immunity because their conduct

was not objectively reasonable under the circumstances. Defendants aggressively sought to terminate Melissa's parental rights for seven months in the admitted absence of any evidence showing she was guilty of child neglect (i.e., that she knew or should have known about the abuse and failed to protect Avery). Underlying the lack of evidence to support the prosecution was palpable personal animosity.

Defendants were not entitled to absolute immunity because they were not the ones who initiated the neglect prosecution, because initiation of the prosecution was made with reasonable suspicion and because Melissa is not seeking to hold them liable for any testimony they have given. Rather, it is their failure to act in an objectively reasonable manner that makes them subject to liability.

ARGUMENT

A. Standard of Review.

This Court reviews the grant of summary judgment de novo. Thomason v. SCAN Volunteer Services, Inc., 85 F.3d 1365, 1370 (9th Cir. 1996). "The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id.

B. Defendants Were Not Entitled to Qualified Immunity.

Qualified immunity protects government officials from liability so long as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. Good v. Olk-Long, 71 F.3d 314, 315 (8th Cir. 1995). In considering a claim of qualified immunity, "[t]he sequence of our analysis is to ask first whether, taken in the light most favorable to the plaintiff, the facts alleged show the officer's conduct violated a constitutional right; and second, whether, in the specific context of the case, the right was clearly established." Swipies v. Kofka, 348 F.3d 701, 703 (8th Cir. 2003)(citing Saucier v. Katz, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "For a constitutional right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Manzano v. South Dakota Dep't of Social Services, 60 F.3d 505, 509 (8th Cir. 1995)(quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). In other words, the test for qualified immunity "focuses on the objective legal reasonableness of an official's acts." Mahers v. Harper, 12 F.3d 783, 785 (9th Cir. 1993)(citing Harlow v. Fitzgerald, 457 U.S. 800, 819, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). "This is not to say an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-

existing law the unlawfulness must be apparent." Manzano, 60 F.3d at 509 (citing Anderson, 483 U.S. at 640).

It cannot be disputed that parents have a recognized constitutional liberty interest in familial integrity. Swipies, 348 F.3d at 703 (citing Manzano, 60 F.3d at 509). Melissa concedes this right is not absolute. It is limited by the state's compelling interest in protecting children. Id. Melissa also acknowledges that the qualified immunity defense is difficult to overcome because of the need to balance her abstract substantive due process right against the state's equally legitimate interest. Manzano, 60 F.3d at 510. However, this Court "has not gone so far as to say that there are no 'clearly established' substantive due process rights held by parents in the context of child abuse investigations." Id. "The dispositive inquiry in deciding 'whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Swipies, 348 F.3d at 703 (quoting Saucier, 533 U.S. at 202).

Melissa has alleged her liberty interest in familial integrity was violated when the defendants persisted in prosecuting the neglect case and seeking termination of her parental rights in the absence of any evidence showing she was guilty of neglect. When the trial court analyzed the facts of this case, it first focused on whether there was reasonable suspicion of child abuse when the Abdouch children were removed from Melissa's care. Add. 14. The court

appropriately cited Thomason for the proposition that "[w]here a treating physician has clearly expressed his or her reasonable suspicion that life-threatening abuse is occurring in the home, the interest of the child (as shared by the state as parens patriae) in being removed from that home setting … outweighs the parents' private interest in familial integrity as a matter of law." Id. at 13-14 (citing 85 F.3d at 1373). Melissa agrees there was reasonable suspicion of abuse and that defendants should have taken immediate action in light of the serious abuse perpetrated upon Avery.

When the trial court considered the propriety of defendants' actions in *continuing* to prosecute the neglect case and seek termination of Melissa's parental rights, however, it erred by failing to view the evidence in the light most favorable to Melissa. The court stated in its analysis that defendants' actions were justified because they were investigating "whether [Melissa] was the perpetrator, and whether she failed to prevent the abuse." Add. 14. The record, however, when viewed in Melissa's favor, shows defendants' actions were not objectively reasonable. Defendants were not permitted to indefinitely deprive Melissa of her constitutional rights in the hope they might find inculpatory evidence at some unknown future time. Here, Defendants ignored for seven months the fact that they had no evidence Melissa was in any way involved in Avery's abuse. Yet, they were all-the-while resolved to terminate her parental rights. Defendants'

unreasonable ignorance of the lack of evidence implicating Melissa began as early as the end of August of 2000, when Detective Larson completed his investigation and ruled out Melissa as a suspect.[12] App. 87-88, 91. On September 21, defendants told Tiede they were seeking termination because they did not know who caused Avery's injuries. App. 146. By this statement, defendants acknowledged they had no evidence. In addition, defendants themselves admitted at the October 18, 2000, adjudicatory hearing they had no evidence Melissa abused Avery or that she knew or should have know about the abuse and failed to protect Avery. App. 92-93, 96, 104. In fact, the medical evidence showed Avery's injuries would *not* be visible to a layperson. App. 8. Defendants ignored this. Soon after the adjudicatory hearing, defendants were told by Howard there was "a very real possibility" Melissa would regain custody of Avery. App. 26-27. Heinemann also believed Melissa should have custody. App. 25, 121. Defendants ignored this. Defendants knew from Melissa's psychological evaluation there was no reason to suspect she would be a threat to her children. App. 33. They ignored this. Tiede told defendants they did not have sufficient evidence to seek termination in April of 2001. Add. 9. Defendants ignored this. Defendants admitted at the June 13, 2001, dispositional hearing they had no evidence that

[12] There was also no evidence that Alexandra and Andrew had been abused or that Michael ever abused Melissa. App. 83, 105, 129, 137.

Melissa abused Avery or that she knew or should have know about the abuse and failed to protect Avery. App. 61-62, 65, 69-70. Even defendants own expert did not see anything in the record that warranted seeking termination of Melissa's parental rights and testified it was not appropriate to consider termination after December of 2000. App. 73, 77. Contrary to the trial court's opinion, there was substantial evidence defendants' actions were not objectively reasonable.

The trial court also stated defendants' actions were justified because "defendants had legitimate concerns as to whether Abdouch would keep Michael out of the family home." Add. 14. Viewing the record in the light most favorable to Melissa, Michael moved out of the home before the adjudicatory hearing. App. 117. There was no evidence Melissa allowed him to visit with Avery or that he was even at Melissa's home, despite numerous unannounced visits to Melissa's home. App. 67-69, 123, 140, 114. Zimmerman observed nothing that caused her any concern. App. 67-68. In addition, the record showed that Melissa would do anything to protect her children. App. 89-90, 56. To this day, she remains divorced from Michael.

The court also stated, "[w]hen it became apparent that [Melissa] was not the perpetrator, had not neglected Avery, and that Michael had actually left the family home, DSS reinstated [Melissa's] visitation rights and gradually returned physical custody to her." App. 10. Although defendants may have returned Avery to

Melissa, the foregoing makes clear that defendants continued to seek termination of Melissa's parental rights.

The record in this case, when viewed in Melissa's favor, shows that the defendants' actions in aggressively seeking to terminate Melissa's parental rights for seven months were not objectively reasonable. Avery was undoubtedly abused, and the abuse was severe and tragic. However, it did not vest in Defendants the authority to continually violate Melissa's constitutional rights by seeking to terminate her parental rights in the absence of any evidence implicating her in the abuse. If defendants' actions in this case are objectively reasonable as a matter of law, it is difficult to imagine a set of facts that would subject social workers to liability for deprivation of one's liberty interest in the care, custody and management of her children.

This Court has previously affirmed the denial of summary judgment in a case with facts less egregious than here. In Swipies, the plaintiff was exercising court ordered visitation with his daughter when a deputy sheriff observed the daughter in the company of an individual who was charged with sexually abusing another juvenile. 348 F.3d at 702-03. The deputy removed the plaintiff's daughter from his custody and returned her to her mother in light of his concern the child might be abused. 348 F.3d at 703. The plaintiff brought a claim under 42 USC § 1983 and the deputy moved for summary judgment based on qualified immunity.

Id. The district court denied the motion, concluding the removal was not objectively reasonable. Id. In affirming, this Court stated:

> Viewing the facts here in the light most favorable to Mr. Swipies, and noting the inconsistencies among Deputy Kofka's statements in the summary judgment record, we conclude that Mr. Swipies retained the right not to be separated from his child in the face of Deputy Kofka's suspicion that Mr. Stark might abuse Kendra. We further conclude that it would have been clear to a reasonable officer that removing Kendra in those circumstances would violate Mr. Swipies' parental liberty interest.

Id. at 703-04. As in Swipies, defendants here continued to seek termination of Melissa's parental rights under the bare suspicion that Melissa might have been involved in Avery's abuse. In addition, as in Swipies, it would have been clear to a reasonable social worker that continuing to seek termination would violate Melissa's parental liberty interest.

Ripson v. Alles, 21 F.3d 805 (8th Cir. 1994), is also instructive. In that case, a police officer arrested a father for sexually abusing his daughter. Id. at 808. The officer did so despite an absence of corroborating physical evidence and a directive from the county attorney to keep investigating. Id. The officer also knew the parents were in an ongoing custody dispute. Id. Under these facts, the Court held the officer was not entitled to qualified immunity, stating "a reasonable officer could not have believed probable cause existed for the arrest of [the father] for sexually abusing his daughter." Id. Although Ripson was actually arrested and temporarily imprisoned, the defendants' actions in this case are arguably as

intrusive and disproportionate.

In granting defendants' motion for summary judgment, the trial court cited extensively from Thomason. 85 F.3d 1365. Thomason, however, is distinguishable because it only dealt with whether the initial removal of a child from his parents' custody was appropriate. Indeed, the parents in that case were separated from their child for just two weeks.[13] Id. at 1370. Thomason did not involve social workers who continued to seek termination of parental rights in the absence of evidence to support their stated goal.

Thomason is noteworthy because the Court indicated that the qualified immunity inquiry does not necessarily end if an action is supported by a reasonable suspicion. Rather, the Court emphasized that the focus must be on the reasonableness of the actions taken under the circumstances. The Court stated, "The difficulty in the present case is not whether such a reasonable suspicion can be found, but rather, whether the actions taken by defendants and the resulting disruption to plaintiffs' familial relations with Anthony were so disproportionate *under the circumstances* as to rise to the level of a constitutional deprivation." 85 F.3d at 1371-72 (emphasis added). This analysis is consistent with Swipies, where the Court stated, "The dispositive inquiry in deciding whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was

unlawful *in the situation he confronted*." 348 F.3d at 703 (emphasis added). See also Manzano, 60 F.3d at 512 (stating that the reasonable suspicion requirement may apply to some aspects of child abuse investigations). This analysis is also consistent with the procedure recommended by the Supreme Court when considering qualified immunity claims by officers requesting arrest warrants. In Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the Court suggested that an officer requesting an arrest warrant will be shielded by qualified immunity for that function unless judged on an objective basis, "no officer of reasonable competence would have requested the warrant." Id. at 346 n. 9. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable … will the shield of immunity be lost." Id. at 344-45. See also, Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985) ("[S]eeking an arrest warrant is 'objectively reasonable' so long as the presence of probably cause is at least arguable.")

That any given actions must be assessed in context should require consideration of the burden of proof defendants had in seeking termination of Melissa's parental rights. In other words, before the Court can fairly determine whether defendants acted in an objectively reasonable manner, it

[13] In addition, as stated, Melissa does not challenge the defendants' initial removal of Avery from her custody.

must consider that defendants were required to meet a clear and convincing evidence standard of proof to successfully terminate Melissa's parental rights.[14]

The South Dakota Supreme Court has stated as follows in defining the "clear and convincing evidence" standard:

> The measure of proof required by this designation falls somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a mere preponderance but not beyond a reasonable doubt. It is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established.

Adoption of Christofferson, 89 SD 287, 232 NW.2d 832, 835 (1975)(Wollman, J., dissenting)(citing Brown v. Warner, 78 SD 647, 653, 107 NW2d 1, 4.). Here, the presence of clear and convincing evidence is not arguable. No reasonable person could have believed there was a fair likelihood of meeting this burden and succeeding in terminating Melissa's parental rights. The facts and evidence in this case clearly would not permit it.

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[14] SDCL 26-8A-27 provides, in part:

[T]he court may enter a final decree of disposition terminating all parental rights of one or both parents of the child if the court finds, by clear and convincing evidence, that the least restrictive alternative available commensurate with the best interests of the child with due regard for the rights of the parents, the public and the state so requires.

The trial court also cited Manzano. 60 F.3d 505. There, an investigator suggested that a mother seek a protection order against a father. Id. at 512. As a result of the protection order, the father was denied visitation rights for approximately two weeks and had supervised visitation for several months. Id. Although the investigator was entitled to qualified immunity, the Court stated, "Under these facts and *in the absence of evidence of improper motive*, we seen no constitutional violation resulting from McLane's mere suggestion that Brooks seek available temporary judicial relief through her divorce proceeding." Id. (emphasis added). The facts of this case are dramatically more egregious, and there is substantial evidence that defendants acted with an improper motive. Manzano thus suggests that defendants are not entitled to qualified immunity.

C. Defendants Were Not Entitled to Absolute Immunity.

The trial court considered the issue of absolute immunity sua sponte. It held that "[t]he role of a social worker in filing proceedings to protect abused minors is functionally equivalent to the role of a prosecutor in initiating a criminal prosecution, thus warranting absolute immunity." Add. 15. The trial court broadly held defendants "absolutely immune for participating in the state court proceedings that led to the removal of Avery from Abdouch's home…." Id. The trial court improperly applied absolute immunity. First, it was Tiede and not the defendants who filed the neglect prosecution. App. 14-15. Tiede is not named as a defendant.

Second, Melissa agrees that defendants should have taken immediate action based on the nature of Avery's injuries. It is defendants' subsequent actions that Melissa believes violated her rights. Third, and perhaps most important, Melissa is not seeking to hold defendants liable for any testimony they have given. To the contrary, their testimony is quite helpful to Melissa's case. This Court has never held a social worker absolutely immune from a suit the likes of which Melissa has brought. See generally, Swipies, 348 F.3d 701 and Manzano, 60 F.3d 505. The trial court improperly granted summary judgment because absolute immunity applies to witness testimony and not to the type of conduct in which defendants engaged. Manzano, 60 F.3d at 512 (citing Stem v. Ahearn, 908 F.2d 1, 6 (5th Cir. 1990).

CONCLUSION

Defendants were not free to seek termination of Melissa's parental rights unless she was somehow culpable in Avery's abuse. When defendants persisted in seeking termination based on neglect, they were required by their own admission to have evidence she knew about the abuse or should have known about it. Extension of qualified immunity under the facts of this case would thwart the basic purpose of § 1983, to protect persons from abuse of official authority. Wyatt v. Cole, 504 U.S. 158, 164, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992)("irrespective of the common law support, we will not recognize an immunity available at common

law if § 1983's history or purpose counsel against applying it in § 1983 actions."). The trial court erred in granting summary judgment because there is a genuine dispute concerning defendants' entitlement to qualified immunity. It also erred in its application of absolute immunity. Melissa respectfully requests that the Court reverse the trial court's decision and remand this case for further proceedings.

Dated this 12th day of January, 2005.

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CERTIFICATE OF COMPLIANCE

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF MINNEHAHA)

Michael Bornitz, being first duly sworn upon oath, states and alleges as follows:

1. I am an attorney admitted to practice before the Eighth Circuit Court of Appeals and a member of the law firm of Cutler & Donahoe, LLP, 100 North Phillips Ave, 9th Floor, Sioux Falls, SD 57104, attorneys for Appellant Melissa Abdouch.

2. The Brief of Appellant was prepared using Microsoft Word 2003.

3. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Appellant complies with the type volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) and contains 6,271 words which were counted using the Microsoft Word 2003 program.

4. Also, pursuant to Eighth Circuit Rules of Appellate Procedure 28A(d), I further certify that the CD-Rom provided to the Court and to opposing counsel have been scanned for viruses, using Norton AntiVirus software, and the CD-Roms are virus free.

Dated this 12th day of January, 2005.

Attorneys for Appellant:
Cutler & Donahoe, L.L.P.

_____
Michael D. Bornitz

Subscribed and sworn to me
this 12th day of January, 2005.

_____
Jody L. Harrell
Notary Public State of South Dakota
My commission expires: 12/20/07

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Brief, one copy of Appellant's Appendix, and Appellant's Brief on CD-Rom was mailed by regular United States mail, first class postage prepaid on this 12th day of January, 2005.

_____
Michael D. Bornitz

ADDENDUM

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